Supreme Court of the United States

OCTOBER TERM, 1965

No. 694

WARREN W. PERRY, PETITIONER

vs.

COMMERCE LOAN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)
)
WARREN W. PERRY)
) IN BANKRUPTCY NO. 3308
WAGE EARNER.) CHAPTER XIII

* * * *

DOCKET ENTRIES

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UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

DEBTOR'S PETITION—Plan filed August 8, 1963

Original Petition in Proceedings Under Chapter XIII for a Wage Earner Plan. In the United States District Court for the Eastern District of Kentucky

In the Matter of WARREN W. PERRY, Debtor. No. 3308

To the Honorable MAC SWINFORD

Judge of the United States District Court

FOR THE EASTERN DISTRICT OF KENTUCKY AT COVINGTON

THE PETITION OF WARREN W. PERRY of 2612 White Court, in the County of Kenton, State of Kentucky, by occupation a Furnace Operator and employed by Moore Lead Company, 4312 Spring Grove Avenue, Cinti, Ohio.

RESPECTFULLY REPRESENTS:

1. Your petitioner has resided (or has had his domicile) at Covington, Kentucky within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

[fol. 3] 2. Your petitioner is an individual whose principal income is derived from wages, salaries or commissions.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is insolvent (or unable to pay his debts as they mature), and desires to effect a composition

(or an extenstion of time to pay his debts, or a composition and an extension of time to pay his debts) out of his future earnings.

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

6. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains and accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

8. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

WHEREFORE YOUR PETITIONER PRAYS that proceedings may be had upon this petition in accordance with the provisions of Chapter XIII of the Act of Congress relating to bankruptcy.

[fol. 4]

ROBERT J. HARRIS
Attorney for Petitioner
Robert J. Harris
1809 First National Bank Bldg.
Cincinnati, Ohio
Co-Counsel

HOWELL W. VINCENT
130 Park Place
Covington, Kentucky

WARREN W. PERRY
Petitioner

UNITED STATES OF AMERICA,)
)
STATE OF OHIO)ss:
)
COUNTY OF HAMILTON)

I, WARREN W. PERRY, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

WARREN W. PERRY
Petitioner.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 5th day of August, 1963.

/s/ Robert J. Harris
ROBERT J. HARRIS, Notary Public
IN AND FOR STATE OF OHIO.
(Official Character)

[fol. 5]

DEBTOR'S PROPOSED PLAN

Pursuant to the provisions of Chapter XIII of the Act of Congress, relating to bankruptcy, and the specific sections set forth below, the undersigned debtor proposes the following payment plan.

(1) SECURED CREDITORS—100% payment upon acceptance of the Plan: Secured debts shall be dealt with severally upon any terms, but only upon written acceptance of this plan. 646 (2-3). A debt shall be classed as secured to the extent of the value of the property encumbered. 57h.

(2) EXECUTORY CONTRACTS—Upon confirmation, the appointed Trustee shall assume of reject this debtor's outstanding executory contract. 613. (1). 646 (6).

(3) UNSECURED CREDITORS—100% payment. All debts held by unsecured creditors of this debtor, including the unsecured portion of partially secured claims, when duly proven, and allowed, shall be paid in full under this plan. Section 646. (1).

(4) STAY OF SUITS—During the pendency of this plan, the Court shall, upon notice and for cause shown, enjoin or stay until final decree, the commencement or continuation of suits against this debtor. Section 614.

(5) NON-ACCEPTING CREDITORS—Those creditors who will not accept payment under this plan, shall not be paid under this plan.. Upon compliance by the debtor, with the provisions of this plan, the Court shall enter an Order discharging all such debts. Sec. 626 (4).

(6) SUBMISSION OF EARNINGS & PROPERTY—The future earnings and property of this debtor are submitted to the exclusive control of this Court for the purpose of enforcing this plan. Sec. 660.

(7) ALTERNATION OF PLAN—The Court, from time to time, during the period of extention, may increase or reduce the amount of any of the installment payments provided by the plan, or may extend or shorten the time [fol. 6] for any such payments where it shall be made to appear after hearing upon notice that the circumstances of the doctor so warrant or require. Section 646 (5). The debtor further represents that he is able to carry out this plan, submits the following:

EMPLOYER: MOORE LEAD CO., 4312 Spring Grove Avenue, Cinti, Ohio.

TOTAL INDEBTEDNESS: $1412 plus Trustee's Administration expense and attory fees.

FEES IN THIS PROCEEDING $250.00

PROPOSED BUDGET:

RENT	40.00
FOOD	80.00
TRANSPORTATION	15.00
INSURANCE	12.00
MEDICAL	18.00
CLOTHING	20.00
MISCELLANEOUS	20.00
TRUSTEE	60.00
	$265.00

TAKE HOME PAY: $265.00

DEPENDENTS: Five (5)

WARREN W. PERRY

[fol. 7]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

ORDER OF COURT DATED SEPTEMBER 18, 1963, FOLLOWING THE FIRST MEETING OF CREDITORS ALLOWING COMMERCE LOAN COMPANY TEN DAYS TO FILE OBJECTIONS TO CONFIRMATION OF PLAN

This case came on for hearing at Covington, Kentucky, on September 12, 1963, pursuant to order of the Court after notice to creditors as required by law for the First Meeting of Creditors. Present were: The Debtor and his attorney, Robert J. Harris, who has designated Howell W. Vincent, 130 Park Pace, Covington, Kentucky, as resident attory for receipt of notices, and R. Howard Smith, attorney for Commerce Loan Company.

It appearing from examination of the Debtor that he filed a prior bankruptcy proceeding in this Court on May 20, 1959, Case No. 1679 in which he received a discharge in bankruptcy on June 29, 1959, and Commerce Loan

Company having objected to confirmation of the Plan by and through its attorney, R. Howard Smith, and it appearing to the Court that the Plan is feasible, and that the Debtor has paid the filing fee and the confirmation fee in this proceeding, and has filed an application for confirmation of the Plan, it is

ORDERED that said Commerce Loan Company is allowed ten days from the date of the entry of this order to file in writing with the Court its objection to confirmation of the Plan setting out the basis therefor at which time the matter will stand submitted to the Court without further hearing otherwise ordered by the Court.

[fol. 8]

IT IS FURTHER ORDERED that during the pendency of this matter the Debtor continue to pay to his attorney of record the payments provided for in the Debtor's Plan, and that said monies be held by the attorney of record as an officer of the Court subject to order of the Court.

IT IS ORDERED that copies of this order be served by mail upon the parties named below.

At Lexington, Kentucky, this September 18, 1963.

/s/ Joe Lee
Referee in Bankruptcy

COPIES OF THIS ORDER
SERVED BY MAIL UPON:

ROBERT J. HARRIS
Attorney for Debtor

WARREN W. PERRY
Debtor

R. HOWARD SMITH
Attorney for Commerce Loan Co.

A COPY ATTEST:

JOE LEE, Referee in Bankruptcy
By L. F. Logan, Clerk

[fol. 9]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:	)	
	)	
WARREN W. PERRY,	)	
	)	IN BANKRUPTCY NO. 3308
WAGE EARNER.	)	CHAPTER XIII

MOTION OF COMMERCE LOAN COMPANY TO DISMISS THE PETITION—Filed September 12, 1963.

Comes Commerce Loan Company of Covington, a corporation, and respectfully moves the Court for an Order dismissing the Petition of Debtor, Warren W. Perry, and to strike the same, along with his Plan Schedules, from the Docket in this cause, on the grounds that said Debtor, as a Bankrupt, in Action No. 1679, United States District Court, Eastern District of Kentucky, Covington, Kentucky, Division, obtained a Discharge in said proceeding last mentioned herein on date of June 29, 1959, and within six years next preceding the filing of this cause.

AUTHORITY: In Re: Schlageter, decided by the Third Circuit Court of Appeals, and for citation see Commerce Clearing House Bankruptcy, Par. 60.882.

R. HOWARD SMITH,
Attorney for Commerce Loan Company of Coxington, Lawyers Bldg, Newport, Kentucky.

I hereby certify that I have served a true and exact copy of the within Motion upon Debtor named herein, by mailing same to Hon. Robert J. Harris, his attorney, at the address of First National Bank Building, Cinti, Ohio, on this the 12th day of September, 1963.

/s/ R. Howard Smith
Attorney for Commerce Loan Company of Covington.

[fol. 10]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:	)	
	)	
WARREN W. PERRY,	)	
	)	IN BANKRUPTCY NO. 3308
WAGE EARNER.	)	CHAPTER XIII

REFEREE'S OPINION AND ORDER ENTERED DECEMBER 2, 1963, DISMISSING THE DEBTOR'S PETITION

This matter is pending upon the application of the debtor for confirmation of his wage earner plan under Chapter XIII of the Bankruptcy Act, and upon the countermotion of Commerce Loan Company of Covington, a creditor, to dismiss the debtor's petition. Dismissal is sought on the ground the debtor obtained a discharge in bankruptcy in a proceeding in this court commenced within six years prior to the date of the filing of the petition under Chapter XIII. The records of this court reveal the debtor filed a petition in straight bankruptcy on May 20, 1959, case no. 1679, and obtained a discharge in bankruptcy therein on June 29, 1959. The present proceeding was filed August 8, 1963.

The question presented is whether relief under Chapter XIII for a wage earner plan is barred by the fact the debtor has been granted a discharge in bankruptcy in a proceeding filed within six years next preceding the filing of the petition under Chapter XIII.

The issue is complicated by the fact the United States Courts of Appeal for the Tenth and Third Circuits have reached opposite conclusions on the matter. See Edins v. Helzberg's Diamond Shops, Inc., C.A. 10, 315 F. 2d 223, decided April 5, 1963, holding a debtor is entitled to relief by means of a wage earner plan under Chapter XIII under such circumstances, and In re Schlageter, C.A. 3, 319 F. 2d 821, decided July 5, 1963, holding he is not.

[fol. 11] The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of chapters 1 to 7, inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . . ." (11 U.S.C.A. Sec. 1002)
>
> "Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges, and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)
>
> "Sec. 656(a). The court shall confirm the plan if satisfied that ————
>
> * * * *
>
> (3) The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . ." (11 U.S.C.A. Sec. 1056) (Underscoring added).

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has commited any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

> "Sec. 14c. The Court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . . ." (11 U.S.C.A. Sec. 32, sub. c.)

A provision similar to Section 656(a)(3), supra, appears in Chapter XI, Sec. 366(3) of the Act. The United States Court of Appeals for the Sixth Circuit had occasion to construe this latter provision in the case of In re Goldberg, 53 F. 2d 454, 80 A.L.R. 399. A careful reading of that opinion convinces the court that, while there was

[fol. 12] disagreement on other grounds, both the majority and minority opinions are in accord on the proposition that all the prohibitive clauses of Sec. 14c are incorporated by reference in Sec. 366(3). In the majority opinion the court said at page 455:

> ". . . The applicable portion thereof is section 12d (11 U.S.C.A. Sec. 30(d), to-wit, that 'the judge shall confirma composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith.' This paragraph originated with the Act, and Congress has never disturbed it. It is not difficult to determine what "acts" and 'duties' were referred to in clause (2). They are those acts and duties found in clauses (1) and (2) of section 14(b) of the original Act. Section 14b has been amended from time to time until it now stands as printed in the margin. By its provisions, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its numbered clauses. See Bluthenthal v. Jones, 208 U.S. 64, 65, 28 S. Ct. 192, 52 L. ed. 390; In re Jacobs, 241 F. 620, 624 (C.C.A. 6). *Section 12d(2) denies composition upon the same grounds; that is, if the bankrupt has been guilty of any of the acts or failed to perform any of the duties specified in section 14b,* AS IT NOW STANDS, which would be a bar to his discharge. If appellant is denied confirmation of the composition he has made with his creditors, it can only be because he is guilty of the offense of applying for such an order within six years after he has been granted a discharge in bankruptcy." See clause (5) of Section 14b . . . ." (Under scoring supplied).

While there is other language in the majority opinion which might be interpreted as modifying the postulate that Sec. 12d(2), now Sec. 366(3) incorporates by reference all of Sec. 14b, now Sec. 14c, as implied in the

above-quoted language, it would appear the court was simply emphasizing that the appellant coud not be deemed guilty of committing the offense of having been granted a discharge in bankruptcy since it was not clear Congress intended the confirmation of a composition to be the [fol. 13] equivalent of a discharge in bankruptcy. By subsequent amendment of the Act of Congress has made it clear that confirmation of a composition and a discharge in bankruptcy are equivalent. Act of 1938; Collier on Bankruptcy, 14th Ed., Vol 1, Sec. 14.01, page 1252. But the hypothesis that Sec. 366 (3) incorporates by reference all of Sec. 14c remains sound.

The various debtor relief chapters are in pari materia. Hellenbeck v. Penn Mutual Life Insurance Co., Bankruptcy Law Reporter No. 221, Oct. 29, 1963, CCH 60,957. If Sec. 366(3) of Chapter XI incorporates by reference all of Sec. 14c of Chapter iii, it follows that Sec. 356(a) of Chapter XIII' does likewise, with the result that confirmation of a wage earner plan is precluded if the debtor has been granted a discharge in bankruptcy in a proceeding commenced within six years prior to the date of the filing of the petition under Chapter XIII.

As stated by the court In re Greenman, 10 F. Supp. 452, at page 453: "It seems to me more reasonable to believe that when Congress provided that the debtor's composition should be confirmed unless he had 'been guilty of any of the acts or failed to perform any of the duties which would be a ground for denying his discharge,' it was nothing but a rather shipshod way of saying that the debtor should have his composition confirmed (and thus be discharged) unless he had by his own act placed himself in a position where he could not receive a discharge under Section 14 in an ordinary bankruptcy." Since the language of Sec. 366 (3) and 356a(3) are similar it would seem Congress intended that a wage earner plan either by way of composition or extension should not be confirmed unless the debtor is entitled to a discharge in bankruptcy.

There is authority for the view that Section 14c(5) is [fol. 14] inconsistent or in conflict with the provisions of Chapter XIII and therefore inapplicable to wage earner proceedings. If this view is valid a prior discharge would

not even bar a subsequent wage earner plan by way of composition. See In re Konbluth, C.A. 2, 65 F. 2d 400, at page 403.

In re Mahaley, 187 F. Supp. 229, (1960) and In re Sharp 205 F. Supp. 786 (1962), it was concluded that the *purposes* underlying Sec. 14, sub. c(5) of the Bankruptcy Act are so inconsistent with the *purposes* underlying relief by way of extension under Chapter XIII as to make said section inapplicable in Chapter XIII proceedings. The word *purposes* is underlined to emphasize there was no finding of inconsistency or conflict in specific language. It is worth noting that Sec. 602 of the Act provides that Chapters 1 to 7 shall apply insofar as they are not inconsistent or in conflict with the *provisions* of Chapter XIII. This would seem to require a finding of inconsistency or conflict in rather specific provisions rather than in purposes.

The conclusion herein is buttressed by the provision in Section 606 of the Act not referred to in the *Mahaley* or *Sharp* cases, to the effect that the rights, privileges and duties of the debtor are the same as those of a bankrupt. It would seem therefore that a right to a discharge is a prerequisite to the right to have a wage earner plan confirmed.

Accordingly, the debtor's application for confirmation of his plan should be, and hereby is, denied, and the motion of Commerce Loan Company to dismiss the petition should be, and hereby is, sustained.

[fol. 15] IT IS ORDERED that copies of this Opinion and Order be served by mail upon the parties shown below.

At Lexington, Kentucky, this December 2, 1963.

/s/ Joe Lee
Referee in Bankruptcy

COPIES OF THIS ORDER
SERVED BY MAIL UPON:

ROBERT J. HARRIS,
Attorney for Debtor.

R. HOWARD SMITH
Attorney for Commerce Loan
Company of Covington, Kentucky

[fol. 16]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

PETITION FOR REVIEW—Filed January 2, 1964

TO JOE LEE, ESQ., REFEREE IN BANKRUPTCY

1. Your petitioner is aggrieved by the order herein of Joe Lee, Referee in Bankruptcy, dated December 2, 1963, a copy of which order is annexed hereto, marked Exhibit A, and made a part hereof.

2. The Referee erred in respect to said order, in that the Referee denied debtor's application for confirmation of Wage Earner Plan and sustained the Motion of Commerce Loan Company to dismiss the Petition of Warren W. Perry because relief under Chapter 13, for a Wage Earner Plan is barred by the fact that the debtor had been granted a Discharge in Bankruptcy within six (6) years next preceeding filing of his Petition under Chapter 13, and such ruling was clearly erroneous.

3. WHEREFORE, your Petitioner prays that said order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy, that said order be reversed, that the Wage Earner Plan filed by the Petitioner be confirmed pursuant to Chapter 13 of the Bankruptcy Act, and that your petitioner have such other and further relief as is just.

/s/ Warren W. Perry
Petitioner

DATED DEC. 31, 1963.

/s/ Robert J. Harris
ROBERT J. HARRIS, Atty for Petitioner
1809 First Nat'l Bank Bldg,
Cinti, Ohio

[fol. 17] CERTIFICATE

I, hereby certify that on the 31st day of December, 1963, I mailed a copy of the above Petition for Review to R. HOWARD SMITH, Attorney for Commerce Loan Company.

/s/ Robert J. Harris
ROBERT J. HARRIS
Attorney for Debtor

[fol. 18]

UNITED STATES DISTRICT COURT
SIXTH DISTRICT

IN THE MATTER OF:)	
)	
WARREN W. PERRY,)	
)	IN BANKRUPTCY NO. 3308
WAGE EARNER.)	CHAPTER XIII

ORDER OF THE U.S. DISTRICT COURT DATED JANUARY 20, 1964 AFFIRMING OPINION AND DECISION OF THE REFEREE IN BANKRUPTCY.—January 21, 1964

The petition for review filed by the debtor is dismissed and the opinion and order of the referee denying confirmation of the debtor's wage earner's plan is affirmed.
See Memorandum

MAC SWINFORD, Judge

[fol. 19]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

* * * *

MEMORANDUM OPINION—January 21, 1964

The wage earner has filed a Petition for Review of an Order of the Referee denying his application for confirmation of his wage earner plan and dismissing his petition. The Referee wrote an Opinion in connection with the Order complained of justifying his action in denying confirmation on the ground that the Debtor obtained a Dis charge in Bankruptcy in this Court on June 29, 1959. The present proceeding was commenced on August 8, 1963.

The question of whether the six-year limitation on successive proceedings under the Bankruptcy Act is applicable to wage earners' plans is by no means settled by the judicial authorities, nor is it expressly resolved by the language of the Act. This judge is of the view, however, that the Opinion of the Referee is correct and that it should be affirmed.

Section 656 of the Act (11 U.S.C. 1056) provides that the court shall confirm a wage earner's plan if, among other conditions, the debtor has not been guilty of any act which would be a bar to the discharge of a bankrupt. A discharge within six years prior is, of course, a bar to a discharge in bankruptcy. 11 U.S.C. 32(5). A number of cases, represented by *In re Holmes*, 10th Cir., 309 F. 2d 748 (1962), have been decided on the view that a wage earner's plan in the nature of an extension should not be barred by a prior discharge because it is so different in purpose from the relief afforded by straight bankruptcy. This reasoning is open to the criticism, however, that there should be no accounting for the purpose of legislation except to resolve ambiguity in the language used therein.

The use of the word "guilty" in section 656(a) (4) in referring to the conduct which bars confirmation of a wage earner's plan may perhaps lead to the thought that [fol. 20] only conduct which is inherently reprehensible is

comprehended by the provision. The appearance of this word here is accidental. The language of the section is a carryover from the corresponding provision in Chapter 11 relating to compositions. This chapter was enacted in 1874, a time when the bars to discharge embraced only offenses under the Bankruptcy Act punishable by imprisonment and the destruction or concealment of records. This would provide a suitable context for the word "guilty" and when prior discharge was added to these bars, the phraseology was not changed, possibly through negligent draftmanship. See *In re Goidberg*, 6th Cir., 53 F. 2d 454 (1931).

The opinion in *In re Holmes, supra*, does not specify the reason for resorting of the general purpose of the legislation as an aid to construction. This decision along with those in *In re Sharp*, W.D. Mo., 205 F. Supp. 786 (1962) and *In re Mahaley*, S.D. Calif., 187 F. Supp. 229 (1960), does well to some extent on section 602 of the Act (11 U.S.C. 1002) which incorporates by reference into Chapter 13 as much of Chapters 1 to 7 as is not inconsistent with the provisions of Chapter 13. But this is only one possible means of carrying the six-year limitation into the matter of confirming wage earners' plans and a general finding of inconsistency of purpose would seem to have no application beyond consideration of how this particular section should operate. The more immediate concern is with the effect of Section 656(a) (4) which states that no more nor less than that whatever is a bar to a discharge in bankruptcy is a bar to the confirmation of a wage earner's plan.

This judge is supported by the case of *In re Schlageter*, 3rd Cir., 319 F. 2d 831 (1963) which holds that a discharge in bankruptcy not more than six years earlier is a bar to the confirmation of a wage earner's plan. The opinion is largely directed to the debtor's argument that [fol. 21] since his plan only contemplated an extension, and all debts would eventually be paid in full, the six-year limitation would be inappropriate. The Court reasoned that no wage earner's plan can be characterized as a simple extension because by operation of Section 661 (11 U.S.C. 1061), the debtor may be discharged at the end

of three years if his failure to pay all his debts is due to circumstances beyond his control.

This Court is also bound by the reasoning of the Court of Appeals for the Sixth Circuit in *In re Goldberg, supra.* The question there was whether a composition under Chapter 11 of the Act could be confirmed when the debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a discharge in bankruptcy. The Court never questions whether the six-year limitation is comprehended by this expression and the opinion is taken up entirely with the matter of whether a prior composition has the same effect as a prior discharge in bankruptcy.

An Order is entered this day affirming the Opinion of the Referee and dismissing the Petition for Review.

/s/ Mac Swinford
Judge

January 20, 1964.

R. HOWARD SMITH
Lawyers Building
Newport, Kentucky
Attorney for Appellee.

ROBERT J. HARRIS
1809 First National Bank Bldg.
Cincinnati, Ohio
Attorney for Appellant

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Before: WEICK, Chief Judge, CECIL, Circuit Judge and KENT, District Judge.

ARGUMENT AND SUBMISSION—Dec. 8, 1964

This cause is argued by Robert J. Harris for Appellant and by R. Howard Smith for appellee, and is submitted to the Court.

[fol. 23]

No. 15809

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * * *

In the Matter of

WARREN W. PERRY, DEBTOR

WARREN W. PERRY, APPELLANT

v.

COMMERCE LOAN COMPANY, APPELLEE

Appeal from the United States District Court for the Eastern District of Kentucky.

OPINION—January 25, 1965.

Before WEICK, Chief Judge, CECIL, Circuit Judge, and KENT, District Judge.*

* Sitting by designation from the U. S. District Court, Western District of Michigan.

PER CURIAM. Perry, the debtor, filed in the District Court a Wage Earner Plan under Chapter XIII of the Bankruptcy Act, 11 U.S.C. §§ 1001-1086. His petition revealed, however, that he had previously filed a petition in bankruptcy within six years of filing the Wage Earner Plan and had been granted a discharge. The referee, for that reason, denied his application for confirmation of the plan and upon motion of a creditor dismissed the petition. This ruling was affirmed by the District Judge upon review of the referee's order.

The only question before us is whether the previous bankruptcy within six years barred confirmation of the plan and warranted dismissal of the case.

In order to confirm the plan, the court must be satisfied among other things, that "the debtor has not been guilty [fol. 24] of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt." 11 U.S.C. § 1056 (3).

A discharge within six years operates as a bar to the discharge of a bankrupt. 11 U.S.C. § 32(c) (5).

The plain language of the Act prevented the court from confirming the plan in the present case. The fact that a Wage Earner Plan seeking an extension of time to pay the indebtedness was involved, instead of another ordinary bankruptcy case, was immaterial. The statutory bar existed in either case.

If proceedings of this type are to be exempted from the provisions of Section 32(c) (5), such exemption should be made by Congress and not by the courts. The National Bankruptcy Conference has proposed amendments to the Act which would permit the filing of such proceedings within six years. See Proceedings of Nat'l Bankruptcy Conf. 1961 Ann. Meeting, Res. No. 2, and Proceedings of Nat'l Bankruptcy Conf. Ann. Meeting of October 25-26, 1962.

Our views are supported by *In the Matter of Schlageter*, 319 F.2d 821 (C.A. 3, 1963); *In re Jensen*, 200 F.2d 58 (C.A. 7, 1952); *In the Matter of Fontan*, 227 F.Supp. 973 (S.D. Miss. 1964); *In the Matter of Nicholson*, 224 F. Supp. 773 (D. Ore. 1963); *In the Matter of Bingham*, 190 F.Supp. 219 (D. Kan. 1960), *aff'd* 297 F.2d 341.

There are other decisions, which we do not follow, that have reached a contrary result. *Edins* v. *Helzberg's Diamond Shops, Inc.*, 315 F.2d 223 (C.A. 10, 1963); *In re Sharp*, 205 F. Supp. 786 (W.D. Mo. 1962); *In the Matter of Mahaley*, 187 F.Supp. 229 (S.D. Cal. 1960); *In the Matter of Verlin*, 148 F.Supp. 660 (E.D. N.Y. 1957), *aff'd* 255 F.2d 682 (C.A. 2, 1958). In our opinion the statute is not susceptible to the construction given it in these cases.

Affirmed.

[fol. 25]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,809

* * * *

In the Matter of

WARREN W. PERRY, DEBTOR

WARREN W. PERRY, APPELLANT

vs.

COMMERCE LOAN COMPANY, APPELLEE

BEFORE: WEICK, Chief Judge, CECIL, Circuit Judge, and KENT, District Judge.

APPEAL from the United States District Court for the Eastern District of Kentucky.

JUDGMENT—January 25, 1965

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that appellee recover from appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

COSTS: NONE

Filing fee	$———
Printing appendix	$———
Bond premiums	$———
Total	$———

[fol. 26]

[Clerk's Certificate (omitted in Printing)]

[fol. 27]

SUPREME COURT OF THE UNITED STATES

No. 120 Misc., October Term, 1965

WARREN W. PERRY, PETITIONER

v.

COMMERCE LOAN COMPANY

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI —October 25, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 694 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 792889 323